IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

WILLIAM GEORGE DAVIS JR.,
Appellant.

No. 2 CA-CR 2018-0320
Filed November 20, 2019

Appeal from the Superior Court in Gila County
No. S0400CR201700550
The Honorable Timothy M. Wright, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Nicholas Chapman-Hushek, Assistant Attorney General, Phoenix
Counsel for Appellee

Emily Danies, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Brearcliffe authored the decision of the Court, in which Presiding Judge Staring and Chief Judge Vásquez concurred.

B R E A R C L I F F E, Judge:

¶1 William George Davis appeals from his conviction after a jury trial of aggravated assault and the mitigated, six-year prison term. He argues the trial court erred in admitting, over his objection, evidence of his post-incident conduct and statements, denying his request for an instruction on simple assault, and failing, *sua sponte*, to instruct the jury on disorderly conduct. We affirm.

Factual and Procedural Background

¶2 "We view the facts and all reasonable inferences therefrom in the light most favorable to upholding the verdicts." *State v. Tamplin*, 195 Ariz. 246, ¶ 2 (App. 1999). In February 2015, R.B. was driving in Payson when, after changing lanes into the right lane in front of Davis's truck, Davis repeatedly honked his horn. R.B. moved into the left lane, and Davis followed "inches" behind her and continued to honk his horn. R.B. sped up and returned to the right lane so that Davis could go around her, but Davis followed "very close" behind her, with his horn still sounding. R.B. again switched lanes, and Davis continued to follow and honk his horn. R.B. then sped up, creating some distance between her and Davis, until she slowed to a complete stop at the entrance to a roundabout, at which point Davis's truck hit the rear of R.B.'s car, causing her to hit her head and to sustain a minor injury.

¶3 The Payson police officer who arrived at the scene and interviewed Davis estimated—based on the damage to the vehicles and his experience—that Davis's truck had been traveling at fifteen miles per hour when it struck R.B.'s vehicle. An accident reconstruction report placed the speed at the time of collision at ten miles per hour. Nonetheless, a witness testified that Davis "was too close" and did not have enough time to stop himself once R.B. stopped her vehicle at the entrance to the roundabout.

¶4 Another witness testified that, after the accident, Davis "was mad" and complained about R.B.'s driving. And another testified that Davis did not ask about R.B.'s condition, say anything to her, or provide her proof of insurance. The police officer who interviewed Davis testified that he admitted to "following too closely and honking his horn," and that he did so because R.B. "had cut him off, and he wanted to make her aware of what she had done." At trial, Davis testified that he did "not recall" making the statements attributed to him. He further testified that, although he honked his horn at R.B. initially, his horn continued blaring because of a malfunction. He further testified that he was not trying to scare R.B. and did not intend to put her in fear of injury or assault.

¶5 Davis was convicted and sentenced as described above. We have jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Analysis

Objection to Evidence of Post-Incident Conduct and Statements

¶6 Davis argues that the trial court abused its discretion when it overruled his relevancy objections, presumably asserted under Rules 401 and 402, Ariz. R. Evid., to testimony by several witnesses regarding his actions and statements after the collision. On appeal, Davis argues that the testimony should have been precluded under Rule 404(b), Ariz. R. Evid., because it was impermissible other-acts evidence. However, an objection on one ground in the trial court does not preserve the issue on another ground on appeal. *State v. Lopez*, 217 Ariz. 433, ¶ 4 (App. 2008). That is, Davis's relevancy objection did not preserve his objection here under Rule 404(b). Because he has failed to preserve his Rule 404(b) argument and does not seek fundamental error review, Davis has waived the issue for review. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17 (App. 2008) (failure to argue that error was fundamental waives fundamental error review). To the extent Davis intends his argument to be that the evidence was irrelevant and his objection should have been sustained, he has failed to develop that argument on appeal, and we will not consider it further. *See State v. Moody*, 208 Ariz. 424, n.9 (2004) (Appellant "must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised. Failure to argue a claim usually constitutes abandonment and waiver of that claim." (quoting *State v. Carver*, 160 Ariz. 167, 175 (1989)).[1]

[1]Notwithstanding, at oral argument, Davis conceded that he had "opened the door" to the state's introduction at trial of evidence of his post-

Simple Assault Instruction

¶7 Davis next argues that the trial court erred by denying his request to instruct the jury on simple assault under A.R.S. § 13-1203(A)(2) as a lesser-included offense of aggravated assault under A.R.S. § 13-1204(A)(2). We review the court's denial of a party's request for an instruction on a lesser-included offense for an abuse of discretion. *State v. Hargrave*, 225 Ariz. 1, ¶ 33 (2010). We view the evidence in the light most favorable to Davis as the proponent of that instruction. *State v. Carson*, 243 Ariz. 463, ¶ 2 (2018).

¶8 "On request by any party and if supported by the evidence, the court must submit forms of verdicts to the jury for . . . all offenses necessarily included in the offense charged." Ariz. R. Crim. P. 21.4(a)(1). "[A]n offense is 'necessarily included,' and so requires that a jury instruction be given, only when it is lesser included *and* the evidence is sufficient to support giving the instruction." *State v. Wall*, 212 Ariz. 1, ¶ 14 (2006). "An offense is 'lesser included' when the 'greater offense cannot be committed without necessarily committing the lesser offense.'" *Id.* (quoting *State v. Dugan*, 125 Ariz. 194, 195 (1980)). "In other words, if the facts of the case as presented at trial are such that a jury could reasonably find that only the elements of a lesser offense have been proved, the defendant is entitled to have the judge instruct the jury on the lesser-included offense." *Id.*

¶9 "A person commits assault" under § 13-1203(A)(2) "by . . . [i]ntentionally placing another person in reasonable apprehension of imminent physical injury." A person charged with committing such an assault may instead be charged with aggravated assault under § 13-1204(A)(2) by committing the assault with "a deadly weapon or dangerous instrument." Assault under § 13-1203(A)(2), then, is a lesser-included offense of aggravated assault under § 13-1204(A)(2), because the latter requires only the additional element that the assault be committed with a "deadly weapon or a dangerous instrument." *See State v. Erivez*, 236 Ariz. 472, ¶ 15 (2015) (finding that assault was a lesser-included offense of aggravated assault). Here, Davis was charged with using his truck as a deadly weapon or dangerous instrument to assault R.B. A "'[d]angerous instrument'" is "anything that under the circumstances in which it is used,

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collision statements and conduct. *Pool v. Superior Court In & For Pima Cty.*, 139 Ariz. 98, 103 (1984) ("[W]here one party injects improper or irrelevant evidence or argument, the 'door is open,' and the other party may have a right to [respond] with comments or evidence on the same subject.").

attempted to be used or threatened to be used is readily capable of causing death or serious physical injury." A.R.S. § 13-105(12). A motor vehicle may be a dangerous instrument simply by virtue of the circumstances under which it is used and the state is not required to show the defendant had a specific intent to use the vehicle as a dangerous instrument. *See State v. Williams*, 168 Ariz. 367, 372 (App. 1991), *vacated in part on other grounds by State v. Williams,* 175 Ariz. 98 (1993).

¶10 Davis argues here and argued below that, because whether an automobile is a dangerous weapon or dangerous instrument is a jury question, and the jury could have found Davis's truck was not a deadly weapon or dangerous instrument under the circumstances, it should have been instructed on assault under § 13-1203(A)(2) as a lesser-included offense. Evidence is sufficient to require a lesser-included offense instruction when two conditions are met: "[t]he jury must be able to find (a) that the [s]tate failed to prove an element of the greater offense and (b) that the evidence is sufficient to support a conviction on the lesser offense." *Id.* ¶ 18. "It is not enough that, as a theoretical matter, 'the jury might simply disbelieve the state's evidence on one element of the crime' because this 'would require instructions on all offenses theoretically included' in every charged offense." *Id.* (quoting *State v. Caldera*, 141 Ariz. 634, 637 (1984)). "Instead, the evidence must be such that a rational juror could conclude that the defendant committed only the lesser offense." *Id.*

¶11 Davis may be correct that whether an automobile is a deadly weapon or dangerous instrument is a jury question. *See Caldera*, 141 Ariz. at 637 (jury question whether inoperable firearm was dangerous instrument); *see also State v. Schaffer*, 202 Ariz. 592, ¶ 9 (App. 2002) (jury question whether prosthetic arm was a dangerous instrument). However, as the state argues, because a guilty verdict under § 13-1203(A)(2) would require the jury to find that Davis used his truck to place R.B. in "reasonable apprehension of imminent physical injury," a reasonable jury could not have found, on the evidence presented at trial, that Davis's truck, as used, was anything other than a deadly weapon or dangerous instrument.

¶12 As to his use of the truck, Davis was following R.B. very closely in the truck for more than a mile, reaching speeds of up to forty miles per hour, and repeatedly switching lanes to remain behind R.B., honking his horn.[2] A police officer who responded to the collision testified

[2]At oral argument, Davis conceded that his conduct placed R.B. in reasonable apprehension of imminent physical injury.

the rear window of R.B.'s car had been "smashed out," and "the sheet metal and the [rear] bumper" had been damaged, including "structural damage behind the bumper." R.B. testified that the estimated cost of repair to her car was in excess of $5,800, and that she received just over $5,200 from her automobile insurance carrier for the vehicle as a total loss. She also testified that she had been injured in the collision. Davis does not dispute now, and did not dispute at trial, that, at all times relevant to the crime charged, he was operating his truck, and that the truck was the instrument that caused R.B.'s injury and damaged her car. Given those undisputed facts, even if Davis had persuaded the jury that his conduct amounted *only* to assault under § 13-1203(A)(2), no reasonable jury could have found those elements satisfied and not have found, inherently or expressly, that Davis had used his truck as a dangerous instrument to effect that assault. Consequently, the trial court did not abuse its discretion in refusing to give the instruction on the lesser-included offense of assault.

Disorderly Conduct Instruction

¶13 Davis also argues that, even though he did not request an instruction on the lesser-included offense of disorderly conduct under A.R.S. § 13-2904(A)(6), the trial court erred by failing to give the instruction *sua sponte*. For purposes of this decision, we assume without deciding that disorderly conduct under § 13-2904(A)(6) is a lesser-included offense of aggravated assault under § 13-1204(A)(2).

¶14 We review a trial court's failure to *sua sponte* instruct the jury on a lesser-included offense for fundamental error. *State v. Tschilar*, 200 Ariz. 427, ¶ 39 (App. 2001). Fundamental error occurs when the error goes to the foundation of the case, takes away an essential right, or is so egregious that the defendant could not have possibly received a fair trial. *State v. Escalante*, 245 Ariz. 135, ¶ 21 (2018). If the error is such that it goes to the foundation of the case or takes away an essential right, the defendant must additionally show such error was prejudicial. *Id.* Consequently, in our review, we first must determine if error occurred at all, the nature of the error, and finally, if a showing of prejudice is required, whether the defendant was prejudiced by the error. *Id.* If the defendant fails to carry his burden of persuasion as to any element of fundamental error, then his claim fails. *Id.*

¶15 Davis argues that the trial court's failure to *sua sponte* give the disorderly conduct instruction was an error that went to the foundation of his case and deprived him of his constitutional right to present his defense. He does not argue that the error was so egregious that he was deprived of

the right to a fair trial. Consequently, prejudice cannot be presumed and Davis bears the burden of showing prejudice. *See id.* Although citing cases which discuss prejudice, Davis has not developed an argument supporting a finding of prejudice. The failure to sufficiently develop an argument on appeal waives the argument. *See Moody*, 208 Ariz. 424, n.9.

¶16 Nonetheless, as the state argues in its brief, our supreme court tells us that a "'trial judge should withhold charging on lesser included offense[s] unless one of the parties requests it, since that charge is not inevitably required in our trials, but is an issue best resolved, in our adversary system, by permitting counsel to decide on tactics.'" *State v. Gibson*, 229 Ariz. 484, ¶ 15 (2012) (quoting *Walker v. United States*, 418 F.2d 1116, 1119 (D.C. Cir. 1969)). And here, Davis may have made just such a tactical decision not to request the lesser-included disorderly conduct instruction. Under the facts of the case, a conviction for disorderly conduct would have, like aggravated assault, been a felony conviction, but such a charge might have been an easier one than aggravated assault on which to reach a conviction. Davis simply may have placed his bet on an outright acquittal on the aggravated assault charge rather than giving the jury a potentially easier route to unanimity. If so, the trial court's *sua sponte* instruction on disorderly conduct would have frustrated Davis's tactical decision. Therefore, apart from Davis's failing to develop a prejudice argument, we cannot say that the trial court's failing to *sua sponte* give the unrequested instruction was error at all.

Disposition

¶17 For the reasons stated above, we affirm Davis's conviction and the sentence imposed.